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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. ~~918~~. 34

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

PETITIONERS' REPLY BRIEF UPON PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY OBSERVATIONS.

Respondent's brief does not take issue with any of the facts contained in the "Statement" of the petition (pp. 6-10 thereof), nor does it claim that the instant action is not a collateral attack upon a federal patent.

Respondent Does Not Squarely Meet Issues.

With respect to the "Questions Presented" (Petn., pp. 4-5), respondent squarely meets No. 5 only.

An affirmative answer to question No. 1 is apparently conceded, for respondent says at brief page 17:

> "We concede that the Land Department has jurisdiction to survey public lands which are a part of the public domain of the United States, but the jurisdiction of the Land Department in surveying Mormon Island was limited to the establishment of a meander line around the shore of the island."

The essential argument in this connection is that, though there was jurisdiction to survey, there was no jurisdiction to err.

The brief reflects no quarrel with petitioners' analysis of the *Knight* case, 142 U. S. 161. It apparently places no reliance upon the Circuit Court's insistence upon specific statutory authority, nor does it challenge petitioners' contention that Norway acted under more specific statutory authority than is found in the facts of the *Knight* case.

Question No. 2 is not directly discussed by respondent, whose sole attempt to establish that the matter is always open for independent re-examination in the courts rests upon a circular form of reasoning which was rejected in the *Knight* case, namely, the assumption as a premise of the desired conclusion that the disputed area was always tideland.

Question No. 3 is but casually touched upon through a quotation from *United States v. Boynton,* at brief page 14.

Concerning question No. 4 respondent concedes, at page 12, that "It may be a question of fact as to whether or not

a line established and surveyed by a surveyor employed by the federal government to survey public land was intended as a meander line or as a boundary line of the tract surveyed," and, abandoning the position taken by the Circuit Court of Appeals, argues the weight of the evidence concerning the matter—utterly ignoring, however, the stipulations made in the trial court and in the brief on appeal, which are cited and quoted at pages 15-16 of the petition.

Question No. 6 is not discussed at all, nor is any question made of the applicability of petitioners' authorities, at their brief pages 57-60.

I.

Respondent's Major Contention Assumes Tideland as a Fact and Argues From That Vantage Ground.

Pages 3-38 and 40-47 of respondent's brief are made up of arguments which assume the *locus in quo* to be tideland and which would be applicable *if* the premise were conceded. But such arguments beg the whole question in the case; they run around a circle which necessarily brings the conclusion back to the premise. It was this type of argument which the Supreme Court of California followed in the *Knight* case; the fallacy of which was so clearly demonstrated by Mr. Justice Field in 142 U. S. 205-6:

> "From the opinions upon both affirmances it appears that the court below, equally with the referee, lost sight of the principle that in actions at law a patent of the United States, upon a confirmation of a private land claim asserted by virtue of rights acquired under a foreign government, is not open to collateral attack, but must be taken as correct until vacated, *not only as to the validity of the claim confirmed, but as to the boundaries established. It is*

hardly necessary to say that any attempt to overthrow these conclusions in either particular, where the tribunal affirming the validity of the claim and the department establishing the boundaries had jurisdiction, is collaterally attacking the patent.

* * * * * * * * * *

"The court below upon the first affirmance rejected the boundary as established and surveyed by the officers appointed by law for that purpose, and assumed that the line of ordinary high-water mark of Mission Creek running into the bay was, as far as such line extended, the true boundary designated by the decree, and held that land below such line was the property of the state. In other words, it assumed that the boundary of the pueblo was to follow the line of high-water mark of the creek, and not be confined to the high-water mark of the bay. *It thereupon stated that the question involved was whether the officers of the Land Department had power to patent land outside of the natural boundaries given in the decree of confirmation.*

"In this statement the learned court fell into an error. No such question was involved in the case. The approved survey upon which the patent was issued crossed the mouth of Mission Creek and included the lands above its mouth, among them the premises in controversy. The question involved, therefore, was whether in an action of ejectment for the possession of those lands the plaintiffs could *collaterally assail the correctness of the official survey upon which the patent was issued and establish another line as the true boundary,* and then recover the lands on showing that they were outside of the new boundary thus established. I do not think that such a position was ever successfully asserted in any court.

If there was error in the survey embodied in the patent it could not have been shown in this action. It could only have been corrected by direct proceedings for that purpose instituted by the government or by its authority. This is elementary law, and in vain will authorities be sought to contradict this view." (Italics ours.)

At page 211:

"The court below having assumed that another line than the one officially established was the true one, *took the extraordinary ground that the error committed in that respect by the surveying officers, though acting under the express directions of the Land Department, was jurisdictional and fatal to their action,* rendering it void, and opening the patent embodying the survey to collateral attack. And it proceeded to cite several decisions in supposed support of this view, *but which only were to the effect that where the Land Department had no jurisdiction over the subject-matter considered its patent could be assailed collaterally.*

"In thus holding, the *court failed to distinguish between what was upon its own statement mere error in the action of the Land Department and matters which were entirely beyond its jurisdiction.* The ascertainment of the true line of the boundaries of the claim confirmed was a matter especially entrusted to that department by the laws of Congress, as already stated. *If the officers* of that department in executing the survey *made mistakes,* ran erroneous lines, and included lands which they should have excluded, *those facts did not justify the assertion that they acted without jurisdiction in making the survey, and that, therefore, their whole proceedings were void.* If all that is asserted be true *they only erred in the exercise*

> *of their jurisdiction,* and the *remedy for their errors before the issue of the patent lay in an appeal* to higher officers of the department—from the surveyor general to the commissioner, and from his decision to the Secretary of the Interior; and if after the issue of the patent like objections were urged, the remedy could be sought *only by direct proceedings.* (Italics ours.)

Pollard's Lessee v. Hagan and Similar Cases Distinguished.

The cases of *Pollard's Lessee v. Hagan,* 3 How. 212; *Goodtitle v. Kibbe,* 9 How. 421, and similar cases would be pertinent if respondent's assumption of established and conceded tideland were permissible. But correctly understood, they lend no support to respondent's position.

The cases of *Pollard's Lessee v. Hagan et al.,* and *Goodtitle v. Kibbe* involved the same matters and, while it is difficult to get at the exact facts, and necessary to refer to *City of Mobile v. Emanuel,* 1 How. 95, and *Pollard's Lessee v. Files,* 2 How. 591, for an understanding thereof, a careful reading of these cases discloses that they involved the validity of an Act of Congress which had the effect of quitclaiming to the city of Mobile lands which were actually situated below high-water mark (see *Mobile Trans. Co. v. Mobile,* 187 U. S. at 490), and were described as "between high-water mark and the channel of the river," the act having been passed after admission of the state of Alabama to the Union. (See Act of May 26, 1824, 4 U. S. St. at L., p. 66; Ch. CLXXXV.) Pursuant to a later private act a patent was issued covering the demanded premises.

The opinions clearly indicate that the issuance of the patent was specifically required by the later congressional act. Examination of the statute confirms this. It is chapter CCCXLIV, found at page 680 of Volume 6 U. S. St. at L.—Private Laws 1789-1845, Inclusive—reading as follows:

> "Chap. CCCXLIV—An Act for the relief of William Pollard's heirs.
>
> *"Be it enacted, etc.,* that there shall be, and hereby is, confirmed unto the heirs of William Pollard, deceased, a certain lot of ground, situated in the city of Mobile, and bounded as follows, to wit: on the north by what was formerly known as John Forbes and Company's canal; on the west by Water street; on the south by the King's wharf; and on the east by the channel of the river; and that *a patent shall issue in the usual form for the same: Provided,* that this act shall only operate as a relinquishment, on the part of the United States, of all their right and claim to the above described lot of ground, and shall not interfere with or affect the claim or claims of third persons." (Italics ours.)

It nowhere appears that there was any survey by the Land Department. *It is certain that no question of the effect of such a survey was considered or discussed.* In fact, the only question to which the cases in 3 How. 212 and 9 How. 421 were directed was the relative rights of federal and state government, after admission of the state to the Union, to lands below high-water mark; it was held that the state takes the same by virtue of its sovereignty and this *is all that the decisions hold.*

Wright v. Roseberry and Similar Cases Inapplicable.

Invoking such cases as *Wright v. Roseberry,* 121 U. S. 488, and *Doolan v. Carr,* 125 U. S. 618, counsel for respondent evince confusion of thought, a failure to distinguish between error in the exercise of jurisdiction and want of jurisdiction. Their arguments are almost identical with those of the California Supreme Court in *United Land Assn. v. Knight,* 85 Cal. 448, which were rejected by this court. That decision relied, as does respondent at bar, upon the cases of *Smelting Co. v. Kemp,* 104 U. S. 641; *Wright v. Roseberry,* 121 U. S. 488; *Doolan v. Carr,* 125 U. S. 618. These and similar cases are cited in the main opinion of the *Knight* case, wherein it is said that:

> "Ever since the decision in Poke v. Wendal, 13 U. S., 9 Cranch. 87, it has been the settled law of this state that a patent is void at law if the grantor state had no title to the premises embraced in it, or if the officer who issued the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law." (P. 176.)

But it was held that that principle and those authorities were inapplicable.

It so happens that Mr. Justice Field participated in all of the five federal decisions which are cited at page 41 of respondent's brief, and that he wrote the opinions in *Smelting Co. v. Kemp, Steele v. Smelting Co.,* and *Wright v. Roseberry.* In the *Kemp* case, it plainly appears that the court considered such circumstances as those enumerated at page 40 of respondent's brief to present a total

want of jurisdiction over the subject-matter. The quotation from the *Wright* case, at brief page 42, contains language to the same effect, as does the *Doolan* quotation at brief page 44.

Referring to such authorities, the same learned justice said in the *Knight* case, at page 212:

> *"The distinction between errors committed where jurisdiction exists to take the proceeding in which the alleged error arises, and where there is an entire want of jurisdiction over the subject-matter considered, is too familiar to be discussed.* The distinction is constantly applied with reference to the proceedings of ordinary tribunals. If they have jurisdiction of the subject-matter and the parties, their judgment cannot be collaterally assailed for mere errors committed in the proceedings leading to it. The remedy for errors must be sought by application for a new trial or by appeal for a review to an appellate court. *The same distinction prevails with reference to the proceedings of the special tribunal or department of the government to which is entrusted the supervision of measures for the issue of its patent.*
>
> "The cases referred to and dwelt upon as supposed to support the opposite doctrine are not susceptible of the meaning attributed to them. The principal cases cited are St. Louis Smelt. & Ref. Co. v. Kemp, 104 U. S. 641 (26:876); Wright v. Roseberry, 121 U. S. 488 (30:1039); and Doolan v. Carr, 125 U. S. 618 (31:844). They assert no new doctrine, but law which has always existed and been recognized, though seldom more misapplied than here. That the United States cannot convey by patent what it never owned, or has already parted with, no matter with what formality the instrument is issued, is a self-evident proposition." (Italics ours.)

Again at page 214:

> "The attempt is futile to use these cases, or any other case, to establish the proposition that if an error can be shown in the action of an officer of the Land Department in a matter subject to its jurisdiction the proceeding of the officer may be treated as a nullity and the patent issued thereon be collaterally assailed. *This view is untenable, and does not merit serious consideration.* If it could be sustained it would be subversive of all security in the judgments of ordinary tribunals, as well as in those of special tribunals like the Land Department." (Italics ours.)

II.

Respondent's Arguments Concerning Meander Lines as Boundaries.

Respondent concedes (Br. p. 12) that it "may be a question of fact" whether a meander line is in fact a definite boundary. But it does not concur in or rely upon the Circuit Court's holding that in this instance the question was purely one of law. On the contrary, it argues the matter as an issue of fact and attempts to establish the sufficiency of the evidence to overthrow the finding of the trial court. There is no denial of the admissions below, which are set forth at pages 15-16 of the petition. Counsel merely ignore the fact that they have heretofore conceded the demanded premises to be included within the confines of the patent and attempt to argue that the evidence required the court, in the face of such admissions, to find the contrary. As to the effect of such finding, see authorities *infra*.

Claimed Right to Reject Meander Corners.

United States v. Boynton, 53 Fed. (2d) 297, is respondent's only support for this contention. The inference which respondent would draw is precluded by this sentence occurring earlier in the same paragraph:

> "Thus, the question we have to determine is whether Snow, in indicating a high tide line, definitely fixed *a shoreline survey.*" (Italics ours.)

There is no room for disputing the fact that Norway was engaged solely in "fixing a shoreline survey." The inference is inescapable that such a "shoreline survey" establishes *boundary.* Moreover, the last phrase of the same paragraph says that in order for a meander to form a boundary "it must be agreed that it indicates a definite boundary limit"; the *Producers Oil Co.* case, 238 U. S. 325, establishes that this agreement can be implied as well as express.

III.

Respondent's Contention That Mean High Tide Line Is the Legal Boundary.

This argument rests primarily upon a misconstruction of the *San Pedro* case and the *Duncan* case, cited at respondent's brief page 57.

San Pedro Decision Not Controlling.

Examination of the *San Pedro* decision will disclose that there was no controversy over the question of whether "the survey and the patent which had been issued were conclusive evidence of the boundary line" (as stated at

Br. p. 13); that, on the contrary, the court, at page 654, stated the crucial issue as follows:

> "The sole question, then, for determination by this court is whether or not the lines of the patent defining the inner bay exception are meander lines of the inner bay within the meaning of the rule which makes the shore line of that bay the actual boundary line where the intent is to meander such shore."

In other words, it was a question of interpretation of the patent as to whether the traverses were true meanders or were boundaries.

Nor did that case authorize the rejection of the meander corners, for no attack was there made upon their location; this is conceded at respondent's brief page 14.

So far as concerns the claim that the case *decided* mean high tide line to be the boundary, counsel have fallen into manifest error. The record in that case shows that the trial court had found as a fact the identity of ordinary high-water mark and the mean high tide line; that the finding was not attacked by either party; and that it formed the basis upon which the Supreme Court necessarily assumed that line to be the true boundary. Judge Wilbur, the author of that opinion, concedes in the case at bar [R. 724] that:

> "It is true, however, as appellees state, that this line 5.1 feet above mean low tide was *agreed upon by the*

> *parties* and upon that basis *assumed by the court* to be the boundary line between the tidelands and the upland." (Italics ours.)

Other California Cases.

City of Los Angeles v. Duncan falls in exactly the same category. The point was assumed, not decided. This appears from the introductory paragraph (130 Cal. App. 12), where it is said:

> "Respondents' disclaimer of any title to tidelands narrowed the dispute to the location on the ground of the line of mean high tide, which, *concededly*, fixed the boundary between the city's tidelands and respondents' property."

The language quoted by respondent was predicated upon this agreement and assumption.

With brief passing observations concerning the *Teschemacher* and *Otey* cases, respondent's counsel ignore the long line of California decisions cited at petitioners' brief page 53; which necessarily and definitely decided the line of the neaps to be coincident with "ordinary high-water mark" and therefore the true boundary.

The Tideland Grant.

Reference to the terms of the grant of tidelands to respondent is of no avail. True, the grant was of lands lying below "mean high tide line." But the case of *Strand Improvement Company v. Long Beach*, 173 Cal. 765, 769, establishes it to be the law of California that the grant

was operative only upon such lands as lay, *at the time of its enactment,* below the line of mean high tide; any land which had been filled and raised above that elevation did not pass.

Likewise it is apparent that the legislative grant could carry nothing except what was vested in the state and that, in view of the long line of uniform decisions as to the boundary line, it was inoperative as to property above the line of the neaps. If this be not so, the Legislature could have granted up to the mean of the highest high tides (which no one but Mr. Hughes claims to be the true boundary), and by the same token could by legislative fiat fix the state's boundary higher and higher according to its own volition.

IV.

Respondent's Attempted Justification of the Circuit Court's Refusal to Examine the Evidence.

The applicability of petitioners' authorities, at brief pages 57-60, is impliedly conceded by respondent. And, indeed, there is no direct claim that the Circuit Court was justified in reversing without an examination of the sufficiency of plaintiff's proofs. Essentially the argument is that the evidence was susceptible of only a single inference and therefore a re-examination by the Circuit Court was a useless procedure. This, of course, begs the question. It substitutes the judgment of a litigant for the considered opinion of one of the highest courts in the land.

Effect of Findings of Trial Judge.

Counsel's claim that the court's findings of fact must be ignored because of the assertion that "the findings and decision of the trial court was based solely upon the erroneous conclusion of law that the patent was conclusive evidence of the character of the land" (Br. p. 39), is misplaced. The rule is well settled that the findings of the trial court will not be set aside unless manifestly incorrect.

Fidelity-Phoenix Fire Insurance Co. v. Benedict Coal Corp., 64 Fed. (2d) 347, 348 (4th C. C. A.);

National Reserve v. Scudder, 71 Fed. (2d) 884, 888 (9th C. C. A.).

Error in the reasoning of the lower court is immaterial even if it be carried into the findings. It is correct result which determines the issue on appeal, not the accuracy of the trial court's ratiocinations.

McCluer v. Heim-Overly Realty Co., 71 Fed. (2d) 100, 101;

Stoody v. Mills Alloys, 67 Fed. (2d) 871, 874 (9th C. C. A.).

Indeed, there is a legal presumption that the trial judge, after filing his memorandum opinion on November 20, 1933 [R. 164] and prior to filing the findings and conclusions on December 8, 1933 [R. 177], disregarded all incompetent evidence (*Elliott v. Gordon*, 70 Fed. 2d) 9, 13 (10th C. C. A.); *Nat Reserve v. Scudder*, 71 Fed. (2d) 884, 888 (9th C. C. A.)); and, plaintiff having alleged the demanded premises to be tide land and the burden manifestly resting upon it, failure to sustain the same by competent evidence necessitated a finding of untruth of the allegation (64 *Corpus Juris*, section 1105, p. 1258).

Memorandum Opinion Does Not Control Findings.

There is no merit in the contention that the written memorandum can control the findings subsequently made; said findings were responsive to the allegations of the complaint and denials thereof, as well as the counterclaim [R. 165].

Stone v. United States, 164 U. S. 380;

British Queen Min. Co. v. Baker Silver Min. Co., 139 U. S. 222;

Webb v. National Bank of Republic, 146 Fed. 717, 719 (8th C. C. A.);

Townsend v. Beatrice Cem. Assn., 138 Fed. 381 (8th C. C. A.);

Consol. Coal Co. v. Polar Wave Ice. Co., 106 Fed. 798 (8th C. C. A.);

Rickard v. Thompson, 72 Fed. (2d) 807, 810 (9th C. C. A.);

Clark v. Milens, 32 Fed. (2d) 1004, 1005 (9th C. C. A.).

Plaintiff's Evidence Was Internally Conflicting and Warranted Opposing Inferences.

The claim that plaintiff's evidence was uncontradicted and susceptible of but one inference does not square with the record. The admissions of the Reply are alone sufficient to sustain the finding. And the other evidence was, at least, equally as consistent with the court's finding as with the plaintiff's contention. The best the trial judge could say was that from plaintiff's evidence the conclusion of tideland "might be drawn". [R. 161.]

Counsel do not challenge the assertion (Petn., p. 18) that "Ninety-three pages of appellees' brief were devoted

to an exposition of the insufficiency of plaintiff's proof of title". This being the case, it is impossible to here review the matter without violation of the rule of this court pertaining to certiorari applications. We quote, however, summaries of petitioners' contentions, as set forth therein:

At page 23:

"Other Insufficiencies of Proofs.

"(a) The proof is equally silent as to the location of the line of the neap tides or the relation of that line to the disputed area. On the basis of 4.7 elevation for mean high tide the mean of the neaps would be at elevation 3.9 feet.

"(b) Plaintiff's case proceeds entirely upon an attempted application of theoretical and technical engineering contours to the *locus in quo.* Its evidence rested wholly upon a datum plane of mean lower low water established in 1875, which, because of improvements which took place between 1871 and 1911 in the way of dredging, deepening and straightening the entrance channel and dredging and deepening the inner bay, so altered the tidal regime as to render wholly inapplicable to conditions in and after 1899 (the period of plaintiff's various measurements) the said datum plane so established in 1875. In other words, the evidence showed indisputably that the deepening and straightening of the entrance and the dredging of the inner harbor so increased the tidal range as to lower the plane of mean lower low water *to an unknown extent* and that this resulted in increasing *pro tanto* each elevation thereafter taken and predicated upon the old datum plane of 1875. This matter will be elaborated in Point IV.

"(c) It will also appear that, by reason of the inappropriate datum plane upon which appellant's oral

evidence and its maps and other documentary evidence are predicated, and for other reasons discussed in Point IV hereof, the plaintiff's case was wholly devoid of any substantial competent evidence which would warrant a finding that the demanded premises were at any time below the line of 'mean high tide.' The burden being upon plaintiff, it necessarily followed that the court had to make findings which negatived the allegation that the disputed area was tideland."

At page 224:

"CUMULATIVE EFFECT OF APPELLANT'S EVIDENCE.

"Attempting to give specific application to plaintiff's claims of its evidence of the location of high water mark, we find the record in a strange state of contradiction and confusion. We have already pointed to the inadequacy of the complaint as a definition of plaintiff's claim * * *; but the net result of plaintiff's evidence leaves not only uncertainty but actual contradiction of such nature that it cannot be accurately ascertained what the plaintiff really claims. Having produced the Turner map, Exhibit 4, with its highwater mark based upon the first day's survey, plaintiff proceeded to introduce Exhibit 5, which is the Hale-Hughes plotting of the Turner notes, with its rejection of the highwater mark of Turner's map. Having thus built up, through a rejection and reverse interpretation of a large part of the notes, a new high water mark which is shown on said Exhibit 5 by a heavy blue line, plaintiff's star witness, Mr. Hughes, on direct examination, over objection [R. 331], testified with reference to the said heavy blue line of Exhibit 5:

" 'I noted that Mr. Turner's lines embraced a somewhat wider area than the area which was above that stage of the tide.

* * * that the lines which would be established on the ground as high water mark by the Turner survey were covered with water when the tide was at an elevation of 5.1 feet above the datum plane. That means that Mr. Turner followed a line which was somewhat lower than 5.1 feet in elevation, that is to say, that at the 5.1 elevation of tide there was a strip which was above water and that strip was in the same position as the strip bounded by the heavy blue lines but a little narrower.' [R. 331-2.]

"And on cross-examination:

" 'that there was not as much land on Mormon Island above the line of mean high tide as shown on the Turner survey.' [R. 343.]

" 'that he, in 1900, had found the strip of land above high water mark to be narrower than that shown in the Turner notes and narrower than the land included within the heavy blue line on Exhibit 5, which he had helped Mr. Hale make; that he had concurred in the location of the heavy blue line on that map and that means that he, the witness, thinks the Turner map was wrong.' [R. 344.]

"Mr. Fitzgerald produced the Desserey map upon which the complaint counts. Mr. Hale depicted upon Plaintiff's Exhibit 2 what he conceived to be the outlines of the disputed area as well as the portion conceded to be upland, the latter being shown in white. [See R. 218-219; Book of Exhibits, p. 1.] This was supposed to show the 5.1 contour of the Desserey survey. Mr. Butts conceded that defendant owned all land within the heavy blue line of Exhibit 5 [R.

379]—thus repudiating the Hughes testimony above quoted—and this was immediately preceded by Fitzgerald's testimony that

'the 4.8 contour line as shown on the map made by the witness is the one which nearly coincides with the heavy blue line desigated as the high water mark on Plaintiff's Exhibit No. 5; comparison of the shape of the 4.8 contour on Exhibit 14 shows that it is a different shape from the heavy blue line on Exhibit 5; that it does not coincide exactly but does have points of coincidence; that the 4.8 contour of Exhibit 14 coincides more closely than the 5.1 with the heavy blue line of Exhibit 5. Referring to Plaintiff's Exhibit 2 and the outlines of the white parcel surrounded by buff, the 5.1 contour of the witness' map would be inside of that outline in most instances.' [R. 379.]

"Mr. Butts' statement therefore rejects the Fitzgerald testimony as well as that of Hughes. And the net result is that plaintiff's counsel conceded defendant's ownership of more upland than his witnesses conceded to exist, counsel standing upon an outline or contour which they rejected. A possible exception is Mr. Turner, whose evidence in this regard [R. 302] can be accorded little, if any, weight because his assertion that the heavy blue line of Exhibih 5 is correct is modified by the further testimony at R. 295 that his checking of the plot sheet with Mr. Hale consisted of this:

"'I went over the map with Mr. Hale and checked it as to the *computing* of the notes.'"

"And at R. 302:

"that is to say, it is correct *as far as the location of the various points are concerned;* * * * they are correctly plotted so far as the angle and distance from the station are concerned."

"Counsel for plaintiff rejected the evidence of the witnesses and rested his case upon the rejected high-water mark contour of Exhibit 5, which no witness claimed to coincide with the complaint description or with the 5.1 contour of the Desserey, map."

V.

DeGuyer v. Banning Discussed.

Respondent seeks directly and indirectly to capitalize the case of *DeGuyer v. Banning*, 167 U. S. 723, from an evidentiary standpoint. In that instance the decree confirming the grant of the San Pedro Rancho was so phrased as to include Mormon Island within its limits, but the plat which was made pursuant thereto and to which reference was made in the patent contained an "inner bay exception," which excluded from the San Pedro grant the said Mormon Island. The question presented was whether the decree or the survey and plat should control. The court definitely held that the patent with its plat controlled "the decree of confirmation and that Mormon Island was not included within the San Pedro grant." This left it a part of the public domain and subject to the Banning patent.

Respondent sought to introduce in evidence the opinion in this case but the court excluded it. [R. 371, 631.] Indirectly, the same end is sought to be accomplished in respondent's instant brief. But it is elemental that statements of fact in a judicial opinion are not competent evidence thereof for any purpose except the particular decision; they are not even binding upon a retrial of the same cause. Court opinions establish the law, not the facts. (*Mackay v. Easton*, 19 Wall. 619; 22 L. Ed. 211, 214; *Virginia etc. Coal Co. v. Charles*, 251 Fed. 83, 118;

Western Union Tel. Co. v. Bradford, 114 S. W. 686, 689 (Tex.).)

Were it conceded that court decisions are evidence of facts in subsequent causes, the DeGuyer opinion would necessarily be disregarded here for, treated as an admission, it fails in the essential element of being opposed to the property interests of the declarant.

Weber v. Chicago etc, R. Co., 175 Iowa 358, 151 N. W. 852;

Donnelly v. United States, 228 U. S. 243, 273;

Boyd v. United States, 30 Fed. (2d) 900, 901 (9th C. C. A.).

Perusal of the *De Guyer* opinion discloses that the issue turned upon the question of whether Mormon Island was "covered by the navigable waters of the inner bay of San Pedro" and thus within the scope of the "inner bay exception" of the patent to the San Pedro Rancho. Banning's defense depended upon bringing his island within this description without wholly relinquishing its status as an island and the subject of Government patent. To this end it seemed to his advantage to minimize the area of the Island uncovered at high tide and to make the upland area appear as insignificant as possible. The witness had strong incentive to then state facts in derogation of the Norway survey. The *sine quo non* of an admission was absent. His proprietary and pecuniary interests would apparently be advanced by statements so made by him, and the one element supplying the sanction of the oath was entirely absent.

Moreover, the admissions of a predecessor in interest are not competent to strike down record title.

Dodge v. Freedman's Savings and Trust Company, 92 U. S. 379;

Jones' Commentaries on Evidence, Second Edition, Vol. II, Sec. 914, p. 1685.

It is also true that the declarations of an owner, though admissible in other respects, are not competent against a subsequent purchaser who acquires the property without knowledge or notice of such admissions.

66 Corpus Juris, Sec. 969, p. 1132;

Pine v. French, 83 Cal. App. 276;

Hamilton v. Consolidated Water Co., 56 Cal. App 7;

Davis v. Ward, 109 Cal. 186;

Harney v. Wirtz, 152 N. W. 803, 807 (N. D.);

Johnson v. Hess, 126 Ind. 298, 25 N. E. 445-449;

2 Pomeroy's Equity Juris (Fourth Edition), Sec. 654, p. 1290.

There is a presumption that the grantee is an innocent purchaser with respect to any matters not appearing of record (*66 Corpus Juris*, Sec. 1062, page 1197), the burden of overthrowing which rests upon the other party to the action (*66 Corpus Juris*, Sec. 1063, page 1198; *Grogg v. Stevens*, 6 Fed. (2d) 862, 863, 4th C. C. A.)

The record at bar discloses the chain of title [R. 660, 688-690]; the alleged admissions of Banning could not possibly appear in it. Moreover, the record affirmatively discloses that the defendant had no knowledge or reason to

believe any of the things stated in the alleged Banning admissions. It is alleged in the answer [R. 55] and admitted in the reply [R. 117],

> "That defendant Borax Consolidated Limited at the time of purchasing the said parcel described in Exhibit 'B' and at the time of accepting said deed, believed that the whole of the land therein described was upland and that none of it was tideland and defendant had no reason to believe that any portion thereof was tideland." [R. 55.]

VI.

Arguments Based Upon Claim of Petitioners' Abandonment of Certain Defenses Are Misplaced.

At pages 61-62 of respondent's brief, the claim is made that the defenses of estoppel, retraxit and the like were abandoned because of failure to introduce evidence in support of them at the trial. We concede that those defenses are not now before this court; but we flatly assert that there never was any abandonment by petitioners of any of said defenses, nor any intent so to do. In the first place, the admissions of the reply were such as to obviate the necessity of evidence upon these defenses. This was fully developed in appellees' brief in the Circuit Court of Appeals at pages 227-228 (where it was claimed, as here, that the admissions of the plaintiff were sufficient to sustain a finding against the tideland claim), and at pages 243-247 (where it was argued that the admissions of the pleadings established a retraxit), and

at pages 248-258 (where like argument was made concerning the plea of estoppel).

Wherefore, it is respectfully submitted that a writ of *certiorari* should be granted herein and the cause reviewed by this Honorable Court, as prayed for in the petition herein.

Respectfully submitted,

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Of Counsel:
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